

In the United States Court of Federal Claims

No. 07-191T
(Filed: July 13, 2007)

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HAROLD B. WILSON,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * *

ORDER GRANTING GOVERNMENT’S MOTION TO DISMISS

Pending before the court is the motion by the United States (“government”) to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). The plaintiff, Harold B. Wilson (“plaintiff” or “Wilson”), seeks \$4.9 million in rewards from the Internal Revenue Service (“IRS”) under Internal Revenue Code (“I.R.C.”) § 7623.¹ The

¹ The version of I.R.C. § 7623 that was in effect at the time that Mr. Wilson claims that he established a right to a reward, provided as follows:

The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for –

(1) detecting underpayments of tax, and
(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,
in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

I.R.C. § 7623 (2000).

The Tax Relief and Health Care Act of 2006 amended I.R.C. § 7623 effective December 20, 2006. The amended cited the original language of § 7623 under § 7623(a) and changed the word “and” to “or” between subsections (1) and (2). The amendment also created “Awards to whistleblowers” under § 7623(b), which provides in relevant part as follows:

(b) Awards to whistleblowers

(1) In general. – If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary’s attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) Award in case of less substantial contribution.--

(A) In general.– In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a government report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action, taking into account the significance of the individual’s information and the role of such individual and any legal representative of such individual contributing to such action.

(4) Appeal of award determination.– Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

government contends that I.R.C. § 7623 does not create a substantive right to monetary relief and that this court therefore lacks jurisdiction over Mr. Wilson's claim.

For the reasons set forth below, the court agrees with the government and therefore plaintiff's complaint must be dismissed.²

BACKGROUND FACTS

The following facts are taken from the plaintiff's complaint and are presumed to be true. The complaint states that the plaintiff identified a corporate tax avoidance scheme and provided reports to the IRS naming 15 corporations that were employing the scheme to avoid federal taxes. The plaintiff's reports led to several visits by IRS revenue agents and one of those agents provided the plaintiff with a Form 211, "Application for Reward for Original Information," for each of the 15 corporations identified. The plaintiff states that he submitted the appropriate forms to the IRS, but that representatives of the IRS eventually informed the plaintiff that his claims were being denied and that he

26 U.S.C.A. § 7623 (Supp. 2007).

² The plaintiff argues that the government's response to the complaint, which was filed on May 21, 2007, was untimely under RCFC 12(a) on the grounds that it was filed more than 60 days from the date on which the complaint was filed. In particular, the plaintiff contends that because his complaint was filed on March 21, 2007, a response was due a day earlier, on May 20, 2007. The argument is without merit. RCFC 6(a) provides that if the deadline for filing a responsive pleading falls on a "Saturday, a Sunday, or a legal holiday . . . [the party may respond on the] next day which is not one of the aforementioned days." May 20, 2007, was a Sunday. Therefore, the government's response, filed on the next day, Monday, May 21, 2007 was timely.

would not receive any reward on any of his award applications. The exhibits attached to plaintiff's complaint demonstrate that his various claims for award were denied during 2002 and 2003.

The plaintiff seeks \$4.9 million which he claims is due for the information he provided to the IRS in connection with three specific companies, International Paper Corporation, Pogo Production Company, and Duke Energy Corporation. The plaintiff alleges that his reports to the IRS resulted in the government collecting over \$200 million in unpaid taxes from these entities. The plaintiff claims that he is entitled to a reward under I.R.C. § 7623 and IRS Publication 733.

DISCUSSION

Under the Tucker Act, 28 U.S.C. 1491 (2000), Congress has provided jurisdiction in the Court of Federal Claims to render judgment upon any claim against the United States only if it is "founded upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491(a)(1). Importantly, while the Tucker Act confers jurisdiction on this court, the Act "does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). Therefore, in order to come within the jurisdictional reach and the waiver of the Tucker Act, "a plaintiff must identify a contractual relationship, constitutional provision, statute or regulation that

provides a substantive right to money damages.” Khan v. United States, 201 F.3d 1375, 1377 (Fed. Cir. 2000) (emphasis added). See also United States v. Mitchell, 463 U.S. 206, 215-216 (1983); Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005); Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607 (1967).

Here, plaintiff relies upon I.R.C. § 7623 and IRS Publication 733 to establish a money-mandating claim. Neither authority, however, is money-mandating. It is well-settled that the version of I.R.C. § 7623 that applies here gives the IRS the “broad discretion to decide whether to make an award or how much to grant.” Merrick v. United States, 846 F.2d 725, 726 (Fed. Cir. 1988). See also Krug v. United States, 168 F.3d 1307, 1309-1310 (Fed. Cir. 1999); Destefano v. United States, 52 Fed. Cl. 291, 293 (2002). I.R.C. § 7623 does not, however, mandate that a reward be paid. Conner v. United States, 76 Fed. Cl. 86, 87 (2007) (quotation omitted) (“I.R.C. § 7623 and 26 C.F.R. § 301.7623-1 do not mandate monetary rewards and consequently do not create a substantive right to money damages, so plaintiff cannot premise jurisdiction on either the statute or the regulation.”). In such circumstances, I.R.C. § 7623 is not money mandating and cannot serve as a basis for jurisdiction in this court.

For the same reasons, plaintiff’s reliance on IRS Publication 733 is misplaced. IRS Publication 733 establishes the basis upon which a reward will be calculated, if the government authorizes an award. The publication does not, however, mandate payment of an award. Krug, 168 F.3d at 1309-1310.

Finally, plaintiff's suggestion that this court has jurisdiction based on an alleged contractual right to payment based on the statute and publication also fails. The Federal Circuit has made it plain that "the United States cannot be contractually bound merely by invoking [I.R.C. § 7623 and 26 C.F.R. § 301.7623-1]." Merrick, 846 F.2d at 726. There is no contractual right to payment where there is no entitlement to payment. As the Federal Circuit explained in Merrick, "a contractual claim against the Government will arise . . . only after the informant and the government negotiate and fix a specific amount as the reward." Id. See also Krug, 168 F.3d at 1309-1310 ("[I]n Publication 733 and pursuant to § 7623 and the regulation, the Government invites offers for a reward; the informant makes an offer by his conduct; and the Government accepts the offer by agreeing to pay a certain sum. When accepted, the amount of the reward is determined in accordance with the formulae.") (emphasis in original). Here the plaintiff does not allege that he and the IRS had "negotiated" the amount of any specific reward. To the contrary, the plaintiff's case is based on his contention that the government refused to provide him with "any" reward.

In sum, regardless of whether the government's decision to deny plaintiff a reward was unreasonable, it is not subject to review in this court because the statute and publication upon which plaintiff relies do not mandate payment of any reward.³

³ The court notes that, when Congress amended I.R.C. § 7623, effective December 20, 2006, see fn. 1, to provide for rewards to whistleblowers, Congress provided that award determinations were to be appealed to the Tax Court.

CONCLUSION

For the reasons set forth above, the government's motion to dismiss is
GRANTED. The Clerk of the Court shall dismiss the complaint without prejudice for lack of subject matter jurisdiction. The Clerk is further directed to return to plaintiff the \$250.00 filing fee he paid upon filing this action.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge_____